No. 578.

Br. of Attorney Gen. (Thompson)
for Appellees.

Filed April 23, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

JOSEPH H. NESBITT AND CHARLES A. MOORE, appellants,
v.
THE UNITED STATES AND THE SIOUX INDIANS.
No. 578.

BRIEF FOR THE APPELLEES.

JOHN G. THOMPSON,
Assistant Attorney-General.

LINCOLN B. SMITH,
Assistant Attorney.

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JOSEPH H. NESBITT, ADA NESBITT, administratrix, and Charles A. Moore,
v.
THE UNITED STATES AND THE SIOUX Indians.
} No. 578.

BRIEF FOR APPELLEES.

This was a suit brought in the Court of Claims under the Indian depredation act of March 3, 1891 (1st Supp. R. S., 2d ed., 913), for the recovery of $7,950 for property alleged to have been taken from the claimants' possession by certain Indians belonging to the Sioux tribe. The depredation occurred in July, 1864. The petition was filed on June 23, 1891. Prior to the filing of this petition no demand had ever been made upon the United States nor upon the defendant tribe of Indians, except by the presentation of the claim to the Secretary of the Interior on March 2, 1891. The demand was, therefore, made for the first time when the claim was 27 years old.

The Court of Claims dismissed the petition for want of jurisdiction under the authority of the *Weston case* (29 C. Cls. R., 420). The claimants thereupon appealed to this court.

The jurisdictional act under which suit was brought in the Court of Claims provides (sec. 2) that:

> All questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government: *Provided*, That no claim accruing prior to July 1, 1865, shall be considered by the court unless the claim shall be allowed, or has been or is pending, prior to the passage of this act, before the Secretary of the Interior or the Congress of the United States, or before any superintendent, agent, subagent, or commissioner authorized under any act of Congress to inquire into such claims; *but no case shall be considered pending unless evidence has been presented therein.*

This claim accrued prior to July 1, 1865. It had not been allowed by the Secretary of the Interior, and it is not claimed that it was pending before any of the officers named in the proviso, except the Secretary of the Interior. The question is, therefore, whether it was "pending" before that officer within the meaning of the statute.

Ordinarily a claim is pending before executive officers as soon as an application for payment is properly made in accordance with the rules applicable thereto. But Congress did not use the word "pending" in its ordinary sense, as it expressly declares in the act that "no case shall be considered pending unless evidence has been presented therein."

The evidence upon which the appellant relies to bring the claim within this description is found in the record on appeal, pages 3 to 6. It consists solely of the sworn ex parte declaration of one of the claimants, Joseph H. Nesbitt. Manifestly this statement would not be "evidence" according to the ordinary rules of law. Was it evidence in this claim before the Secretary of the Interior?

All claims filed in the Interior Department after 1872 were filed under the authority of the act of May 29 of that year (17 Stat. L., 190; secs. 445 and 446, R. S.), which provides *inter alia* that—

> It shall be the duty of the Secretary of the Interior to prepare and cause to be published such rules and regulations as he may deem necessary or proper, prescribing the manner of presenting claims arising under existing laws or treaty stipulation, for compensation for depredations committed by Indians, *and the degree and character of the evidence necessary to support such claims.*

Under such authority the Secretary of the Interior did prepare and cause to be published certain rules and regulations governing the presentation of Indian depredation claims. Such portions as are pertinent are here reproduced.

> 1. Application for indemnity or satisfaction for the loss or injury sustained must be made by the claimant, his attorney, or duly authorized agent, * * * to the United States * * * Indian agent, subagent, within whose

jurisdiction or charge the nation, tribe, or band is to which the offenders or depredators belong.

2. The necessary documents and proofs must accompany the application of the claimant, his attorney, or agent, and should be in legal form, and consist—

First. Of the sworn declaration of the claimant, setting forth when and where the depredation was committed, and by what Indians, their tribe or nation being named; describing fully the property stolen or destroyed, and giving the quantity of each article or number, condition, or quality thereof, and the just value of each article or piece of property at the time the same was so taken or destroyed. Should the depredation have been committed while the claimant was in the Indian country, he must state whether he was lawfully there, either having a license to trade with the Indians, a passport, or a permit from the proper Indian authorities, or was *en route* through said country to a place of ultimate destination at some point within the limits of any State or Territory not included within the limits of the reservation for any nation or tribe of Indians set apart by treaty provision, or by Executive order; and he in such declaration must further state whether any of the property so stolen or destroyed has subsequently been recovered by or for him, the claimant; and whether the claimant has at any time received part compensation therefor; and if so, how much, when, and from what source; and further, that the claimant has in no way endeavored to obtain private satisfaction or revenge.

> Second. Of depositions of two or more persons having personal cognizance of the facts or any of them as embraced in the declaration of the claimant, which depositions must set forth the means of knowledge which deponents have as to the fact of the depredation, when, where, by what Indians, and under what circumstances the depredation was committed, of what the property consisted that was so taken or destroyed by the Indians, describing it as fully as practicable, and stating the value thereof. If the deponents, or any of them, were at the time of the depredation in the employment of the claimant it must be so stated, and in what capacity. (Regulations Indian Department, 1884, p. 81.)

From the above rules it appears that in order to institute a claim for Indian depredations it was necessary to present the sworn declaration of the claimant, setting forth in detail the circumstances of the alleged loss. This sworn declaration must be supported of course by evidence, and that evidence must consist of the depositions of two or more witnesses having personal cognizance of the facts.

Clearly the declaration of the claimant was no more evidence before the Interior Department than is the petition in the Court of Claims, which, as provided by the statute, must contain substantially the same allegations and particulars, and must also be verified by the affidavit of the claimant or of his attorney.

> The sworn allegations of the claimant, relied upon as evidence presented to the Secretary of

> the Interior, were nothing more than were required by the rules of the Secretary to form part of the application for payment, and can not be considered as evidence made necessary by the act to constitute a case pending. (*Weston's case*, 29 C. Cls. R., 420, 423.)

In this case the claimant filed his sworn declaration, as required by the statute and the regulations made thereunder. Appended to that declaration were a bill or statement of account or letter from his attorneys, transmitting the declaration and stating that corroborative affidavits of other witnesses would be forwarded upon notification that the claim would be considered (R., p. 3), and an extract from a newspaper advising prospective claimants to file their claims before the passage of the bill then pending. Neither of these papers can be considered evidence by any stretch of the imagination.

If the claimant's sworn declaration be "evidence" within the contemplation of the statute, then the limitation provided in section 2 would be meaningless, since such declaration under oath was required by the rules in every application; and if this be evidence, then all applications were pending without regard to the evidence presented. (*Weston's case*, 29 C. Cls. R., 420, 424.)

The second clause of the fourth section of the statute, relied upon by the learned counsel for the appellants, (Brief, p. 5) is not applicable to this question. That section, as pointed out by the chief justice in the

Weston case, applies only to evidence made competent in the Court of Claims after the passage of the act.

The undoubted intent of Congress in excluding cases wherein evidence had not been presented was, as stated by Chief Justice Richardson,

> to protect those who had incurred the expense of taking testimony and collecting evidence and presenting the same to the Department, and to exclude those who had made application for payment and thereafter had taken no steps for the prosecution of their claims, *and especially to exclude those who, while the bill was pending before Congress, hastened to make application for payment of claims which had been neglected for so many years as to labor under the presumption, or suspicion at least, of being visionary or stale.* (*Weston's case*, 29 C. Cls. R., 420, 424.)

This case is preeminently one of the class which it was the intent of Congress to exclude. The claimant alleges that he suffered from a depredation by Indians in 1864; yet for twenty-seven years he slept upon his rights, made no complaint, made no application for indemnity, and served no notice of his claim upon the United States or the Indian tribe. The failure to present evidence in support of his claim prior to the date fixed by the statute was due wholly to his own negligence. Such cases as this were precisely those which Congress intended to exclude. To quote again from the opinion in Weston's case: "What has happened was probably anticipated by Congress; that during the pendency of the bill a large number of claims

would be presented to the Secretary of the Interior with the hope of gaining a standing in the Court of Claims under the act without having incurred any expense whatever in obtaining and presenting evidence in their support." To this it may be added that not only did such claimants fail to present any evidence in support of their claims, but they, by their neglect and failure to present such claims, necessarily deprived the defendants of the opportunity of securing evidence concerning the alleged depredations while the witnesses and actors were living and accessible.

The claimant's belated action in filing his claim on the day before the passage of the act was not sufficient to take the case out of the bar of the statute; and the judgment of the Court of Claims dismissing his petition for want of jurisdiction should be affirmed.

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